Nos. 87-712 and 87-929

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN
SERVICES, et al., Petitioners
v.
COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,
Cross-Petitioner
v.
OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN
SERVICES, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

# BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, RESPONDENT/ CROSS-PETITIONER

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## QUESTION PRESENTED

Whether the United States District Court has authority under 28 U.S.C. § 1331, and 5 U.S.C. § 702, to review a decision by the Secretary of Health and Human Services to deny reimbursement under the Medicaid Act for the federal share of services provided by Massachusetts to its mentally retarded citizens.

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## STATEMENT OF THE CASE

### Introduction

The Commonwealth of Massachusetts challenges two adjudicatory decisions of the Secretary of Health and Human Services which "disallowed" reimbursement under the Medicaid Act for medical and rehabilitative services provided to mentally retarded persons. The Commonwealth sought judicial review of those decisions in the customary forum, the United States District Court, pursuant to 5 U.S.C. § 702 and 706. That court reviewed the administrative record under familiar standards, determined that the Secretary had misinterpreted the Medicaid Act, and "reversed." Pet. App. 32a. The court of appeals upheld the district court's interpretation of the Medicaid Act. The Secretary, however, departing from settled interpretations of the statutes governing judicial review of his decisions, and from his own previous representations to federal courts throughout the country, argued on appeal that the district court lacked jurisdiction over the case.

The court of appeals affirmed the district court's jurisdiction to review the disallowance and to grant related injunctive and declaratory relief as to the "prospective" and "ongoing" relationship between the Commonwealth and the Secretary. But the court of appeals also opined that, under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, only the

United States Claims Court would have jurisdiction to order the Secretary to reimburse Massachusetts for past services. Thus, the court advised that if the Secretary should fail to provide reimbursement in the wake of its ruling on the merits, Massachusetts' recourse would be in the Claims Court.

Massachusetts maintains that under 28 U.S.C. § 1331 and 5 U.S.C § 702, Congress designated the district court as the forum for judicial review of final agency action such as the decision of the Secretary in this case. We will meet the Secretary's novel reading of the relevant statutes and their legislative histories on their merits. The fundamental point is that the Secretary's highly technical approach should not be



permitted to obscure the essence of the Commonwealth's complaint. That complaint is nothing more or less than a petition for judicial review of an agency decision, over which Congress conferred jurisdiction in the district court.

## The Medicaid Act

Congress created the Medicaid program in 1965 as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396q. See 79 Stat. 343 (the Medicaid Act). The purpose of the Medicaid Act is to encourage and assist the States to provide health care for their needy, aged, disabled and dependent citizens. 42 U.S.C. § 1396; Connecticut Department of Income

Maintenance v. Heckler, 471 U.S. 524, 528-9 (1985). The Court has described the Medicaid program as "a cooperative endeavor in which the Federal Government provides financial assistance to participating states to aid them in furnishing health care to needy persons." Harris v. McRae, 448 U.S. 297, 308 (1980). The program is one of "cooperative federalism," in which the Federal Government agrees to pay a specified percentage of the total amount expended under the Medicaid plan submitted by the State and approved by the Secretary. Id.

The Act "authorize[s] to be appropriated for each fiscal year a sum sufficient to carry out [its] purposes. . . ." 42 U.S.C. § 1396. The Act provides that the federal government will share the



cost of "medical assistance" and "rehabilitation and other services to help [eligible individuals] attain or retain capability for independence or self-care . . . ." Id.

To qualify for federal Medicaid grants, a State is required to submit a "state plan for medical assistance" to the Secretary. 42 U.S.C. §§ 1396a(a) and 1396b(1). The plan sets forth, among other things, standards of eligibility and descriptions of covered services. Upon the approval of a state plan, the Secretary must pay the federal share of covered services to the state. 42 U.S.C. § 1396b; Pet. App. 9a.[1/]

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1/ The Medicaid Act defines "medical assistance" to mean, among other things, "payment of part or all of the cost of

(footnote continued)

The Secretary's principal powers of oversight under the Medicaid Act are two: (1) the disallowance of reimbursement for specific State expenditures, and (2) the determination that a State plan, or its administration of its plan, fails to comply with the Act. See 42 U.S.C. §§ 1316, 1396c. Initially these powers were seen to be distinct. The former power was understood to be retroactive and narrowly focused, and to involve mainly technical audit issues. The latter power was understood to be prospec-

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(footnote continued)

. . . intermediate care facility services." 42 U.S.C. § 1396d(b). The court of appeals noted, correctly, that "intermediate care facility services include both 'health' and 'rehabilitative' services." Pet. App. 10a.



tive and to involve important issues of statutory interpretation and policy. Reflecting this understanding, Congress provided for review of compliance decisions directly in the courts of appeals, 42 U.S.C. § 1316(a)(3), but left review of disallowance decisions (following administrative reconsideration, see 42 U.S.C. § 1316(d)),[2/] unspecified. See Commonwealth of Massachusetts v. Departmental Grant Appeals Board, 698 F. 2d 22, 24-26 (1st. Cir. 1983)(and cases

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2/ Section 1316(d) provides as follows: Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under Title I, X, XIV, XVI, or XIX, of this chapter, or part A of subchapter IV of this Chapter, shall be disallowed for such participation, the State shall be entitled to and upon request shall receive a reconsideration of the disallowance.

collected). However, the disallowance procedure has increasingly been used to establish and enforce against the States the Secretary's view on significant issues of statutory interpretation and policy; and as so used, it has a powerful prospective, coercive effect. See Pet. App. 5a. 3/

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3/ This use of the disallowance power has required the regional courts of appeals to determine whether the States' challenges to disallowance decisions are actually compliance matters reviewable by the courts of appeals, since disallowances often involve important legal questions which are functionally or effectively similar to compliance decisions. See Commonwealth of Mass. v. Dept. Grant Appeals Board, 698 F. 2d at 26-27; New Jersey v. Dept. of HHS, 670 F. 2d 1284 (3d Cir. 1982); Illinois v. Schweiker, 707 F. 2d 273, 276 (7th Cir. 1983).



The Massachusetts Disallowance

Massachusetts first participated in the Medicaid program in 1966. Pet. App. 20a. Its plan for medical assistance has been approved by the Secretary. In accordance with its plan and the Medicaid Act, Massachusetts provides medical and rehabilitative services to eligible mentally retarded citizens who reside at state-owned and operated intermediate care facilities for the mentally retarded (ICF/MR's). Pet. App. 2a.

In 1982 and 1984, the Secretary disallowed reimbursement to Massachusetts for certain services provided to persons under the age of twenty-two years at Massachusetts ICF/MR's during the years 1978-1982. Pet. App. 2a-3a, 10a-11a,

40a, 53a. As the district court noted, the services in question were intended to "enable" the mentally retarded individuals "to achieve some degree of self-care." Pet. App. 26a-27a. The services included training mentally retarded individuals in "signal[ling] for food when . . . ready to eat to prevent aspiration of food into lungs; attending auditory stimulation for two minutes; locating hidden objects; showing preference for certain objects presented; and encouraging social interactions with adults." Pet. App. 26a and n. 7.

The Secretary declined to share the cost of these services. He did not find that Massachusetts had not provided the services, or that it had requested or received excess reimbursement. Rather,



the Secretary claimed that these services are not covered by Title XIX. He asserted that they constitute "education" and thus were ineligible for reimbursement under a regulation which provides that federal Medicaid reimbursement "may not include reimbursement for vocational training and educational activities." 42 C.F.R. § 441.13(b); Pet. App. 2a-3a, 10a-11a, 40a, 53a.

Massachusetts appealed both disallowances to the Board. Pet. App. 39a-84a. The Commonwealth's appeal did not dispute the proposition that if the services at issue were not covered by Title XIX, they were not reimbursable. Nor did the Commonwealth's appeal present an issue as to whether the services were actually provided, or as to the calculation of the

disputed amount. Rather, the only substantive issue presented to the Board was whether certain medical and rehabilitative services provided to the institutionalized mentally retarded are services covered by Title XIX. Pet. App. 39a-40a, 53a.

The Board heard witnesses, received documentary evidence, and heard argument of counsel. The Board "uph[e]ld" the disallowances, id. at 52a, 84a, and informed Massachusetts that the Board's decision "constitute[d] the final administrative action on this matter." J.A. 18.



Judicial Proceedings

Massachusetts sought review of the two decisions of the Board in the United States District Court for the District of Massachusetts. Pet. App. 89a-94a; 95a-99a. Each complaint sought "judicial review of a final decision" of the Board, Pet. App. 89a, 95a, and "declaratory and injunctive relief pursuant to 5 U.S.C. §§ 702, 703, and 28 U.S.C. § 2201, to determine the rights and obligations of the Commonwealth under the Medicaid program and to prevent the wrongful withholding of federal reimbursement." Pet. App. 90a, 96a.

The complaints invoked the subject matter jurisdiction of the district court under 28 U.S.C. § 1331, Pet. App. 90a,

96a, and alleged that the United States had "waived its immunity by 5 U.S.C. § 702." Id. at 90a, 96a. The Commonwealth claimed to be a "party aggrieved by the decision of the Board," and named as defendants, inter alia, "members of the panel of the Board which rendered the decision. . . ." Id. at 90a, 96a.

The body of each complaint described the Medicaid Act and the administrative proceedings which had preceded the two final decisions of the Board. Pet. App. 91a-92a, 97a-98a. The Commonwealth's claims included the familiar grounds for reversal of final federal agency action contained in 5 U.S.C. § 706: the complaint alleged that the Board's decisions were "based on errors of law", "arbitrary and capricious", "in excess of statutory authority", and "unsupported by substan-



tial evidence." Pet. App. 92a-93a, 98a. The prayers requested that the district court:

> 1. Enjoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth, or from recovering from the Commonwealth, the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded.
>
> 2. Set aside the Board's decision.
>
> 3. Grant such declaratory and other relief as the Court deems just.

Pet. App. 93a-94a, 98a-99a.

The Secretary answered the first complaint and asserted as a "defense" that the Board's decision was "supported by substantial evidence." (October 28, 1983); see J.A. 11, 28. He then filed a "Memorandum Concerning Subject Matter Jurisdiction." J.A. 19-22. In his memo-

randum the Secretary stated that "[a]s a matter of policy, HHS has decided not to press the defense of lack of jurisdiction in this action." J.A. 20.[4/] The dis-

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4/ The Secretary's explicit waiver of the jurisdictional issue in the district court (December 24, 1983, J.A. 20), was closely related to his representation to the First Circuit in an earlier case, Massachusetts v. Departmental Grant Appeals Board, 698 F. 2d 22, 26 (1st Cir. January 12, 1983)(holding that a petition for review under 42 U.S.C. § 1316(a)(3) actually concerned a disallowance, not a compliance matter), that he would not contest the district court's jurisdiction to review a disallowance decision. See Connecticut Dept. of Income Maintenance v. Heckler, 471 U.S. 524, 528 n. 8 (1985) (state had simultaneously sought review of a Board decision in both circuit and district courts). District Judge Garrity heard both Medicaid disallowance cases, and the Secretary advised the district court almost simultaneously in the two cases that he did not dispute its jurisdiction. See Massachusetts v. Heckler, 576 F. Supp. 1565, 1567 (D. Mass.), rev'd on other grounds, 749 F. 2d 89 (1st Cir. 1984), cert. denied, 472 U.S. 1017 (1985)

(footnote continued)



trict court nevertheless considered the question, since it was obliquely presented by the Secretary's advice, and ruled that it had jurisdiction. Pet. App. 37a-38a.

The Secretary and the Commonwealth filed cross-motions for summary judgment. J.A. 23-26. The Commonwealth moved the district court "to grant summary judgment in its favor and reverse the decision of the [Board]." Id. at 23. The Secretary moved the district court to "enter an Order affirming the decision of the [Board]." Id. at 25.

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(footnote continued)

Thus, the Secretary has not simply changed his mind on this question; he has repudiated express representations both to the district court and to the court of appeals in this and a related case.

The district court granted summary judgment for Massachusetts, (Pet. App. 17a-31a), and entered a judgment that simply stated that the disallowance "is reversed." Id. at 32a. The district court entered neither an injunction nor a money judgment awarding damages.

On appeal to the First Circuit, the Secretary argued for the first time that the district court lacked subject matter jurisdiction. The court of appeals affirmed on the merits but vacated and remanded in part. The court determined that the district court could review the Secretary's decision and grant injunctive and declaratory relief since this "grant-in-aid dispute" has a "significant, prospective effect on the ongoing relationship between the federal agency and the affected state[.]" Pet. App. 5a. The



issue presented by the Commonwealth concerned the "scope of the Medicaid program, not just how many dollars Massachusetts should have received in any particular year." Pet. App. 5a. The court of appeals also hypothesized, however, that "[s]hould the Secretary persist in witholding reimbursement for reasons inconsistent with our decision, the Commonwealth's remedy would be a suit for money past due under the Tucker Act in the Claims Court[,]" where the doctrine of collateral estoppel would apply. Pet. App. 6a-7a. Thus the court of appeals addressed an issue not present in the case and held in substance that while the district court "had jurisdiction to review the disallowance decision of the Grant Appeals Board and to grant declara-

tory and injunctive relief," it could not "order the Secretary to pay the money." Pet. App. 6a. The court of appeals concluded that "the district court should send the case back to the Secretary for action consistent with the Medicaid Act as interpreted in this decision." Pet. App. 6a.

## SUMMARY OF ARGUMENT

I.A. The nature of this case and the Secretary's decision demonstrate that the district court had jurisdiction. The Commonwealth's complaint is in its essence a suit for judicial review, and the judgment entered by the district court (reversal of the Secretary's decision denying Medicaid reimbursement)(Pet. App. 32a) was the only relief necessary



to accomplish the purpose of the suit. Whether or not the district court could enter a "money judgment" as such (a form of relief never sought by the Commonwealth nor entered by any court in this case), it was clearly empowered to "set aside" the decision of the Board under 5 U.S.C. § 706.

The jurisdiction of the district court is also supported by the nature of the Medicaid program and the Secretary's decision. The Secretary is a partner in a cooperative effort to provide vitally important services to needy people. Through the use of his disallowance power, however, the Secretary implements policies governing ongoing programs which can often result in the termination of services. For these reasons, Congress

intended to direct the important questions presented by Medicaid disallowances to the district courts and regional courts of appeals.

I.B. The broad waiver of sovereign immunity contained in the APA encompasses the Commonwealth's complaint for judicial review. The legislative history of the 1976 amendments and decisions of this Court demonstrate that the APA covers a broad range of actions seeking judicial review, including cases involving grant-in-aid programs. Relying upon these authorities, the federal courts have consistently held that, in a challenge to a Medicaid disallowance, a district court has jurisdiction notwithstanding that such judicial review might result in disbursement from the federal treasury.



Contrary to the Secretary's arguments, no other provision of the APA forecloses district court jurisdiction in this case. This case is a suit for judicial review, not "money damages." 5 U.S.C. § 702. The Secretary's mischaracterization is inconsistent with his apparent concession that actions which seek only review and relief as to future Medicaid services (while waiving rights to reimbursement for past periods) are not suits for "money damages," and are within the jurisdiction of the district courts. Neither logic nor the legislative history of the APA support this distinction. Indeed, the lengthy exerpts of the legislative history of the APA cited by the Secretary, in his effort to equate "money damages" with "monetary relief," are

beside the point because this action is in its essence one for nonmonetary relief. Furthermore, this Court has previously stated that "reimbursements" under a similar program are not "damages."

Nor is district court jurisdiction foreclosed by 5 U.S.C. § 704. Even assuming that some portion of this action is cognizable under the Tucker Act, the available remedies in the Claims Court are, by the Secretary's concession, inadequate in grant-in-aid cases, which affect vital services to needy persons and present important questions of statutory interpretation and social policy.

I.C. The APA and the Tucker Act should be construed so as to fit this case into the entire system of remedies



against the Government. The language and legislative history of related portions of the Social Security Act (SSA) and the Federal Courts Improvement Act of 1982 (FCIA) support district court jurisdiction of this case. The SSA and the FCIA demonstrate long-term and prevailing Congressional intent to vest power to review agency action under Title XIX and other titles of the SSA in the district courts and the regional courts of appeals, and to limit the creation and jurisdiction of "specialized" courts, particularly those created by the FCIA.

The district and circuit courts have developed substantial experience deciding cases involving grant-in-aid programs under the SSA and other statutes. In the Medicaid Act itself, Congress has authorized review in the courts of ap-

peals of closely-related "compliance" disputes between the States and the Secretary. Given this grant of authority, and the similarity of the legal questions presented by "compliance" and "disallowance" disputes, it is inconceivable that Congress intended review of disallowance matters in the Claims Court.

If the Congress that enacted the FCIA in 1982 believed that the Court of Claims already had jurisdiction to review scores of types of agency decisions, including those made in grant-in-aid programs under the Social Security Act, Congressional debate regarding specialized courts would have been pointless. Furthermore, by the time of the enactment of the FCIA, the lower courts had already determined the jurisdiction of the district courts over



Medicaid disallowances, and Congress in the FCIA expressed no dissatisfaction with those decisions.

Finally, it is reasonable to infer that the FICA preserved district and regional court of appeals review of cases such as the Commonwealth's because Congress was aware of (1) the inconvenience to needy persons and the States of litigating in the Claims Court, and (2) the expertise in the subject matter already developed by the district and regional courts of appeals.

II. A. The Secretary argues that if any aspect of the Commonwealth's case is within the jurisdiction of the Claims Court under the Tucker Act, then the district court lacks jurisdiction over the entire action, and, accordingly, the

court of appeals erred in concluding that such a case could be "bifurcated." This argument assumes that this case may be brought under the Tucker Act. But according to the Secretary, the term "money damages" in the APA also defines the limits of Tucker Act jurisdiction in the Claims Court, and we have shown that the Commonwealth's case is not one for "money damages." Alternatively, the Secretary's argument fails because, under the decisions of this Court, there is no cognizable "claim" under the Tucker Act unless a federal law mandates compensation for damages sustained. The Medicaid Act is not such a law. In arguing to the contrary, the Secretary has abandoned his statutory role as a partner in providing services to needy persons for a new role



as a paymaster. The Secretary's new incarnation cannot transform the federal share of reimbursement for services into "damages sustained" by a State and cognizable under the Tucker Act.

II. B. Finally, even assuming that the district court lacks jurisdiction over some aspect of a disallowance dispute, the Tucker Act does not deprive the district court of jurisdiction to review the Secretary's action, interpret applicable statutes and regulations, and grant appropriate declaratory and injunctive relief. If "bifurcation of claims" were to result, it would represent an inevitable and tolerable by-product of the relationship between the APA and the Tucker Act. Since the Secretary concedes that the district court has jurisdiction

to review disallowances upon a waiver of a claim for "money past-due," his concern for claim-splitting reduces to a policy concern best directed to Congress, not the Court.



## ARGUMENT

### I. DISTRICT COURT REVIEW OF THE FINAL DECISION OF THE SECRETARY TO DENY MEDICAID REIMBURSEMENT IS AUTHORIZED BY THE ADMINISTRATIVE PROCEDURE ACT.

#### A. The Nature of this Case and the Decision of the Secretary to be Reviewed Support District Court Jurisdiction.

1. The very nature of this case and the Secretary's decision demonstrate that the district court had jurisdiction. See Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984)(Congressional intent as to judicial review to be discerned from "the nature of the administrative action involved"). The Commonwealth's complaint is in its essence a suit for judicial review, and reversal of the Board's decision is the

only relief necessary to accomplish the purpose of the suit.

The case arose because of a specific, adjudicatory decision of the Grant Appeals Board, which held that certain services provided to the mentally retarded were not covered by Medicaid. In the district court, the Commonwealth sought review of the substantive validity of the Board's decision. The Commonwealth prayed the court to "set aside agency action," 5 U.S.C. § 706, the relief "characteristically provided" under administrative law. See United States v. Mottaz, 476 U.S. 834, 850 (1986). In fact, the Commonwealth sought the same review sought in similar grant contexts, where this Court has stated that "[in]



reviewing a determination . . . that a State has misused [federal] funds, a court should consider whether the findings are supported by substantial evidence and reflect an application of the proper legal standards." Bennett v. Kentucky Department of Education, 470 U.S. 656, 666 (1985)(citations omitted).

Because the Commonwealth's case was an action for judicial review, and not a claim for "money past due" or a "money judgment," an order "setting aside" the Board's decision would have provided the Commonwealth full relief. The Commonwealth (and the courts below) assumed that the Secretary would abide by the terms of the remand. Whether or not the district court could enter a money judgment as such (a form of relief never sought by the Commonwealth nor entered

by any court in this case), it was clearly empowered to "set aside" the decision of the Board, and to enforce that decision if the Secretary refused to abide by it.

The court of appeals agreed that the district court had the authority "to review the disallowance decision . . . and to grant declaratory and injunctive relief," Pet. App. 6a, and remanded the case to the Secretary for application of its interpretation of the Medicaid Act to the facts of this case. Pet. App. 7a n. 2, 16a. The Secretary does not directly contest the authority of the district court to reverse and remand. Sec. Br. at 12 n. 6. This is important because this disposition provided all of the relief necessary to accomplish the object of the Commonwealth's case. See



Sec. Br. at 15 n. 11. Upon remand, the Secretary (and the Board) are obliged to follow the interpretation of the Medicaid Act determined by the district court and affirmed by the court of appeals. Thus the authority of the district court invoked by the Commonwealth is that traditionally exercised in district court review of agency action.

Contrary to the opinion of the court of appeals, the Commonwealth neither sought nor obtained a "money judgment." Pet. App. 16a. It is true that the district court's opinion (as distinguished from its judgment) specifies relief that could be read as broader than necessary to grant the Commonwealth complete relief, see Pet. App. at 31a, but it does not need to be decided in this case

whether a State may obtain a judgment, broader than reversal, which finally determines that a service is reimbursable, and which orders the Secretary to make a specific adjustment in the State's grant account.[5/] In the ordinary review of a disallowance, such an order is not necessary to grant complete relief. See Connecticut v. Schweiker, 557 F. Supp. 677, 1091 (D. Conn. 1983)("this Court

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5/ But we note that such a determination is effectively the same thing as a determination that a service is covered by the Medicaid Act and state plan. If the Secretary had been upheld on the merits, the effect would be to deny services to recipients. It would be anomalous to hold that a question which may be litigated by recipents in the district courts may be litigated by the States only in the Claims Court. Apparently the Secretary agrees that the States may litigate in the district court, but he would exact the penalty that the States must waive their right to receive the federal share of past expenditures. Sec. Br. at 15 n. 11, 46.



trusts that HHS . . . will promptly restore any set-off already taken. An injunction is therefore unnecessary."). Certainly the bare possibility that the Secretary will contemn the judgment should not defeat the Court's jurisdiction to render it. In any event, in this case, the Court need only determine that the district court has jurisdiction to review and reverse a grant disallowance.

2. The authority of the district court under the Administrative Procedure Act is also supported by the nature of the Medicaid program and the Secretary's decision. Grant-in-aid programs to state and local governments represent the predominant portion of federal grant programs. The programs covered by such grants have increased in number and subject in the past twenty-five years.

See 1987 Statistical Abstract of the United States, Table Nos. 435-437.

"[F]ederal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." Bennett v. Kentucky Dept. of Education, 470 U.S. at 669. Disputes under the various programs often require the interpretation of extensive and complex statutes and federal regulations and present difficult public law questions of widespread interest and impact.6/

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6/ In fact, the growth of these programs and the increase in federal-state disputes led Congress in 1974 to enact the Federal Grant and Cooperative Agreement Act, P.L. 95-224, 92 Stat. 3. The Act was intended to "distinguish federal assistance relationships from federal procurement relationships. . . ." Sec. 2(a); S. Rep. No . 93-1239, 93d Cong., 2d Sess. at 1, 3, 5, 9.



In the Medicaid program, the Secretary has asserted that his disallowance power extends beyond the offset of past overpayments against current payments, or similar routine adjustments. Such offsets would be a usual feature of a grant program. See, e.g., 2 R. Capalli, Federal Grants and Cooperative Agreements, §§ 8.13-8.16 (1982). The Secretary, however, claims the power to make a unilateral determination in a disallowance proceeding that a particular class of expenditure was not and is not in the future reimbursable. Thus, in these and previous disallowances, the Secretary has relied on section 1396(d) to disallow reimbursement for expenditures made in accordance with a state plan, on the

basis of his post hoc interpretations of Title XIX or HHS regulations.

The important policy implications of the Secretary's disallowances were evident to the court of appeals. Pet. App. 4a. The court noted that the "Secretary uses these decisions to implement important policies governing ongoing programs," and that a disallowance is a "statement of law governing the ongoing relationship between the Commonwealth and HHS." Id. at 4a, 5a. The Grant Appeals Board concurred in this view. Id. at 81a-82a ("Significant legal questions . . . can arise from disallowances based on audits.").

Thus the Secretary's decision may, and in this case does, have wide legal and human effect. As we demonstrate



below in Point I, B, Congress intended to direct these important questions to the district courts and regional courts of appeals.

3. The Secretary's brief ignores the nature of grant programs and disallowances, and mischaracterizes the relief which the Commonwealth sought and obtained. The Secretary erroneously claims that it is the Commonwealth's "view" that "the APA's waiver of sovereign immunity is broad enough to encompass both its claims for prospective relief and its claims for past-due money from the United States." Sec. Br. at 9. The Secretary essentially argues that any complaint which may incidentally require the disbursement of federal funds is a "claim against the United States" cognizable

only under the Tucker Act, 28 U.S.C. § 1491. The Secretary repeatedly claims that this is in essence an action simply to "enjoin" the payment of money. E.g., Sec. Br. at 9, 12, 21.

These are mischaracterizations of the Commonwealth's case. The Commonwealth neither makes a "claim" nor seeks a money judgment. It seeks reversal of an administrative decision.

To be sure, that remedy may have fiscal consequences. Any ultimate cost to the United States, however, is incidental to the relief sought in the petition for judicial review. Congress intended that jurisdiction depend on the essence of the final agency action and the nature of the review sought. Massachusetts alleges that the Secretary has made an unlawful decision, after an



adjudicatory proceeding, which has significance apart from the money involved in the period at issue. The fact that, under the Secretary's regulations, reimbursement ultimately may follow from the decision of the court does not deprive the district court of jurisdiction, because the Commonwealth did not seek a money judgment. So long as the complaint may be objectively read to be in essence a request for judicial review of an agency decision of this type, the district court has jurisdiction whether or not there could be incidental fiscal consequences.

This jurisdictional rule is no different from those applied by the federal courts to resolve other questions as to the respective jurisdictions of the

district court and the Claims Court. For example, when a court determines whether a claim is one "founded upon" a contract for purposes of the Tucker Act, the court examines "the source of the rights upon which plaintiff bases its claims, and upon the type of relief sought (or appropriate)." Spectrum Leasing Corp. v. United States, 764 F. 2d 891, 893 (D.C. Cir. 1985), quoting Megapulse, Inc. v. Lewis, 672 F. 2d 959, 968 (D.C. Cir. 1982). "A court will not find that a particular claim is one contractually based merely because resolution of that claim requires some reference to a contract." Spectrum Leasing Corp., 764 F. 2d at 893 (emphasis original). Similarly, this Court should not characterize this action as a "claim against the United States," or one for



"money past-due," merely because the action involves an identifiable amount of money. Indeed, unlike the contract cases cited above, resolution of this disallowance dispute does not require any "reference" to the money involved. Id.

The Secretary implies that these propositions, if accepted, will encourage "artful pleading" designed to mask "claims for money" as petitions for judicial review. See Sec. Br. at 18 n. 15, 22-23.[7/] The Commonwealth does not wish to encourage "artful pleading. "However, an objective assessment

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7/ There is an element of inconsistency in this position. The Secretary's Question Presented and portions of his argument repeatedly isolate one word ("enjoin")(Pet. App. 93a, 98a) from the Commonwealth's complaint to "prove" the

(footnote continued)

of this case by a court need not depend solely upon the form of the complaint. A challenge to an agency disallowance in the district court has a foundation in administrative law that is evident from an objective reading of the complaint and the nature of the agency decision under review.[8/]

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(footnote continued)

alleged jurisdictional flaw in the entire action, while ignoring the essence of the Commonwealth's complaint. E.g., Sec. Br. at 4, 5, 12, 21. Elsewhere, however, the Secretary warns of the dangers of permitting jurisdiction to turn on "artful pleading." E.g., Sec. Br. at 22-23.

8/ This test is actually of the same type as that of the Fifth Circuit, (apparently endorsed by the Secretary) which determines whether an action is "in essence" one for "money damages." Amoco v. Hodel, 815 F.2d 352, 362 (1987).



B. The APA's Broad Waiver of Sovereign Immunity Encompasses the Commonwealth's Complaint for Judicial Review.

The language, legislative history, and purpose of the APA all support the jurisdiction of the district court over this case.

1. Section 702 Waives Sovereign Immunity for a Broad Range of Agency Action, Including Grant Disallowances.

The Administrative Procedure Act (5 U.S.C. §§ 701-706)(the APA) does not itself create subject-matter jurisdiction. Califano v. Sanders, 430 U.S. 99, 107 (1977). However, it supplies a general cause of action in favor of persons

aggrieved by final agency action. See Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984).

Section 702 of the APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." In previous administrative cases decided by the Court, in which an organic statute was silent on the subject of judicial review, the Court has applied a presumption that review is available in the district courts. See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); 5 U.S.C. §§ 701(a), 702, 704. In such cases the Court has held that in the absence of any indication in a statute that the agency decision is



committed wholly to its discretion, or that review is otherwise precluded (see 5 U.S.C. § 701(a)), the decision is subject to judicial review in the district courts under 5 U.S.C. §§ 701-706. See, e.g., Bowen v. Michigan Academy of Family Physicians, 467 U.S. 667 (1986).

These holdings rest on the policies underlying the Administrative Procedure Act. "[T]he legislative material elucidating that seminal act manifests a congressional intention [to] cover a broad spectrum of administrative action[.]" Abbott Laboratories v. Gardner, 387 U.S. at 140. Relying in part upon Abbott Laboratories, the Court has observed in dicta, in a case involving a grant-in-aid program similar to Medicaid, that the district court has

jurisdiction over a State's challenge to a disallowance "under the general grant of jurisdiction over cases involving federal questions, 28 U.S.C. § 1331 (1976 ed., Supp. V)." Bell v. New Jersey, 461 U.S. 773, 777-8 n. 3 and 792 (1983)(disallowance under the Elementary and Secondary Education Act of 1965), citing K. Davis, Administrative Law § 23.5, p. 135 (2d ed. 1983); C. Wright, Law of the Federal Courts § 103 (3d ed. 1976).

As early as 1975, one court of appeals considered the text, legislative history, and policy of 42 U.S.C. § 1316(d), and ruled that Medicaid disallowances were reviewable in the district courts. County of Alameda v.



Weinberger, 520 F. 2d 344, 347-9 (9th Cir. 1975).[9/] Since Alameda, the lower federal courts have applied the same analysis and overwhelmingly concluded that judicial review of Medicaid disallowances is available in the district courts. Illinois v. Schweiker, 707 F. 2d 273, 275-277 (7th Cir. 1983); Connecticut v. Schweiker, 557 F. Supp. 1077, 1079 (D. Conn. 1983), reversed on other grounds, Connecticut v. Heckler, 731 F. 2d 1052, 1055 (2nd Cir. 1984)(district court has jurisdiction under APA), aff'd, Connecticut v. Heckler, 471 U.S. 524 (1985)(no mention of a jurisdictional defect); Colorado

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9/ County of Alameda expressly limited its holding to the circumstance in which the [federal] agency had already used "self-help setoff procedures" to collect the amount disallowed. 520 F. 2d at 349 n. 11.

Dept. of Social Services v. HHS, 558 F. Supp. 337, 347-48 (D. Colo. 1983), aff'd, 771 F. 2d 1422 (10th Cir. 1985); State of Georgia v. Califano, 446 F. Supp. 404 (N.D. Ga. 1977); Michigan v. Secretary of Health and Human Services, 563 F. Supp. 797 (W.D. Mich. 1983), aff'd, 744 F. 2d 32, 35 (6th Cir. 1984)(district court has jurisdiction to review disallowance claims); Oregon Department of Human Resources v. Dept. of Health and Human Services, 727 F. 2d 1411, 1414 (9th Cir. 1983)(following County of Alameda) (Secretary concedes jurisdiction).[10/]

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10/ In Minnesota v. Heckler, 718 F. 2d 852, 857-860 (8th Cir. 1983), the Eighth Circuit ruled that while declaratory relief was available in the district court, and while the district court may review decisions of the Grant Appeals Board, it may not enter a judgment in damages or an injunction having the same effect. Thus the Eighth Circuit's decision resembles that of the court of appeals in this case.



Contrary to the assertion of the Secretary (Memor. of Cross-Resp. at 4), lower court decisions finding district court jurisdiction include cases where the Secretary raised or the court considered the Tucker Act as a possible bar to its jurisdiction. See, e.g., Maryland v. Department of Health and Human Services, 763 F. 2d 1441, 1445-51 (D.C. Cir. 1985)(disallowance under Title XX of the Social Security Act reviewable in district court; Tucker Act does not apply or otherwise preclude district court jurisdiction); Delaware Div. of Health v. U.S. Department of Health and Human Services, 665 F. Supp. 1104 (D. Del. 1987) (district court, not Claims Court, has jurisdiction over Medicaid disallowance); Virginia v. Bowen, No. 84-1171-R (W.D. Va. February 3, 1988)(same).

These decisions of the lower courts are supported by the legislative history of section 702. In 1976, Congress amended section 702 to waive the defense of sovereign immunity "in all equitable actions for specific relief" and eliminated the amount-in controversy requirement of 28 U.S.C. § 1331 for actions against the United States and federal officials. H.R. Rep. 94-1656, 94th Cong., 2d Sess. 9 (1976); Pub. L. No. 94-574, 90 Stat. 2721 (1976). The Senate report noted that in enacting earlier statutes such as the Tucker Act, Congress had already "made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens. . . ." S. Rep. No. 94-996, 94th Cong. 2d Sess. (1976) at 3 (emphasis added). Reform



was needed, however, for other kinds of cases challenging agency action. "These actions usually take the form of a suit for injunctive, declaratory or mandamus relief against a named federal officer on the theory he is exceeding his legal authority." S. Rep. 94-996 at 4.

The 1976 House and Senate reports specifically state that the APA amendments were intended to authorize judicial review in cases previously blocked by sovereign immunity, including cases involving the "administration of Federal grant-in-aid programs." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1, 9; S. Rep. No. 94-996 at 8.

These aspects of the legislative history of § 702 demonstrate that Congress intended district court review of cases such as grant-in-aid disallow-

ances. If cases involving the "administration of federal grant-in-aid programs" were already cognizable under the Tucker Act in 1976, there would have been no reason to identify those cases as an object of the 1976 APA amendments.[11/] Further, the 1976 elimination of the amount in controversy requirement in 28 U.S.C. § 1331 ensured that any actions for which immunity was waived by § 702 could proceed in

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11/ Contrary to the Secretary's assertion the cases cited in the House and Senate reports as the kind of cases which it was the purpose of the APA to permit ultimately sought disbursement of grant funds by alleging unlawful agency action. Dermott Special School District v. Gardner, 278 F. Supp. 687, 690 (E.D. Ark. 1968); Lee County Special School Dist. No. 1 v. Gardner, 263 F. Supp. 26, 30 (D. S.C. 1967). Furthermore, at the time of the 1976 amendments to the APA, Richardson v. Morris, 409 U.S. 464 (1973)(per curiam), had already held that a suit for equitable relief against the administration of a Social Security Act program was not cognizable under the Tucker Act.



the district court under federal question jurisdiction. See Davis, Administrative Law Treatise, § 23.-03-1 at 373 (Supp. 1982) (provision in APA Section 703 for review in "court of competent jurisdiction" means, in absence of contrary statute, review in district court). The legislative history of the repeal of the amount in controversy requirement identifies examples of cases otherwise cognizable in the district court which failed for lack of a sufficient amount in controversy. S. Rep. 94-996 at 12-13. Those cases included suits where plaintiff "claim[ed] that he was entitled to a federal grant or benefit such as federal employment or welfare. . . ." Id. at 13 (footnotes omitted). Thus, the legislative history

of the APA demonstrates that Congress intended that the district courts review disputes under federal grant programs such as Medicaid, notwithstanding that such review might result in disbursement from the federal treasury.

### 2. The Commonwealth's Case is for Judicial Review, Not "Money Damages."

The Secretary asserts that the Commonwealth's action is outside the APA's waiver of sovereign immunity because it is a suit for "money damages." Sec. Br. at 24-34. This argument is refuted by the nature of this case. See Point I, A, supra. The Secretary's claim is also refuted by the nature of the system of federal funding used in the Medicaid program and common to many federal grant programs. Before



turning to this second point, however, we note that the Secretary's definition of the term "money damages," which equates the term with the jurisdictional reach of the Tucker Act, would allow the Court to decide that the term "money damages" does not apply in this case if the Court decides that the case is not cognizable under the Tucker Act. The Secretary argues that "money damages" is a "shorthand phrase that this Court has often used -- interchangeably with other phrases describing monetary recoveries -- to describe the limitations, inferred from legislative context, on the jurisdiction conferred by the Tucker Act." (Br. at 18-19) (citations omitted). If this is so, and the Court accepts the argument that the Tucker Act does not encompass this case (Point II, A,

infra), then the term "money damages" used in § 702 cannot exclude the Commonwealth's case from that section's waiver of sovereign immunity. Alternatively, the Court should determine that the legislative history of the APA and the nature of the Medicaid program demonstrate that the Commonwealth's case is not one for "money damages."

The Secretary argues that the Congress which added the term "money damages" to the APA intended the term to apply to all actions "for monetary relief." Sec. Br. at 24-34.[12/]

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12/ The Secretary relies extensively on excerpts from the hearings on the amendments to the APA, and law review articles which the Secretary claims provided the impetus for those amendments. Testimony at hearings and other submissions to Congress ordinarily provide limited guidance in discerning

(footnote continued)



According to the Secretary, an action seeking review of a Medicaid disallowance is an action for "monetary relief." However, even if the term "money damages" includes actions for "monetary relief," both terms only describe actions which in their essence seek money judgments.

The Commonwealth does not seek a money judgment or "monetary relief." It seeks judicial review and reversal of an unlawful agency decision. The Secretary apparently concedes that actions which

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(footnote continued)

legislative intent. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203-204 n. 24 (1976); Kelly v. Robinson, No. 85-1033 (November 12, 1986), slip. op. at 13-14 n. 13. Even articles and testimony cited by the legislative reports stand at least one step removed from the actual words of Congress, and where, as here, there is an interpretation of the statute that produces a more sensible result, such statements are easily outweighed.

seek judicial review and orders as to future Medicaid services are not ones for "money damages," regardless of whether the reviewing court determines the Secretary's future obligation to pay. Sec. Br. 15 n. 11. If that is so, it is also clear that an action for review of an agency decision is not an action for a money judgment or money damages, since it simply determines the correctness of the agency's substantive legal decision, and not the Secretary's monetary liability. Yet the Secretary contends that if reimbursement for past audit periods is involved in a case, that fact transforms the case into a suit for money damages.[13/]

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13/ In a similar context, this Court rejected a characterization of reimbursement under the Education for All Handicapped Children Act as "damages." School Committee of the Town of

(footnote continued)



The legislative history of the APA amendments supports the conclusion that Congress did not intend to include actions such as this within the term "money damages." The term "money damages" was added to the APA in the 1976 amendments. The legislative history of the term demonstrates an intent to equate the term with well-known claims for damages which arose in contract and tort actions. See 121 Cong. Rec. 29, 995 (1975)(remarks of Sen. Bumpers); Sovereign Immunity: Hearing on S. 3568, before the Sub Comm. on

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(footnote continued)

Burlington v. Department of Education, 471 U.S. 359, 370-371 (1985). "Reimbursement . . . merely requires "payment of "expenses" that "should have been paid all along." Id. The remedy of reimbursement sought in Burlington was determined by this Court not to be "damages" but a "post hoc determination of financial responsibility." Id. The same characterization applies here.

Administrative Practice and Procedure of the Senate Judic. Comm., 91st. Cong., 2d Sess. (1970) at 18. Indeed, the references to the Tucker Act which appear in the House and Senate Reports on the APA amendments are exclusively concerned with contract claims. H.R. Rep. No. 94-1656 at 5, 12; S. Rep. No. 94-996 at 4, 12.

In labeling the Commonwealth's case as a suit for money damages, the Secretary ultimately would make jurisdiction turn upon the fact that he has already acted to recoup the disputed amounts from subsequent reimbursement. Under the current system of advance funding and retroactive audit and disallowance, the Secretary recoups disallowed funds from future payments. See 42 U.S.C. §§ 1396b(d). Thus the Secretary need not commence an enforcement action to



recover disallowed funds. Compare Bennett v. Kentucky Department of Education, 470 U.S. at 658 (enforcement action). In the absence of preliminary injunctive relief, the Secretary's power to recoup monies from future advances invariably means that a state must pursue litigation after re- coupment takes place. Thus the court of appeals noted that the "structure of the Medicaid program . . . makes it inevitable that disallowance decisions concern money past due." Pet. App. 4a. It is this posture (as a plaintiff pursuing a suit after recoupment) which exposes a State to simplistic characterizations of its case as a suit for "money past-due" and "money damages."

The Secretary relies upon his recoupment of funds from future payments to support his novel argument on

jurisdiction, yet the Secretary concedes that the district court would have jurisdiction over an action which sought review of his decision but granted only "prospective" relief. Sec. Br. at 15 n. 1. If this is so, then jurisdiction would turn upon the outcome of each State's request for preliminary relief, because if such relief were obtained, no request for money "past-due" would be present. There is no evidence whatsoever that Congress intended such an uncertain basis for jurisdiction.

The court below determined that the term "money damages" in § 702 should be read "to mean any monetary relief, whether it is in the nature of damages or in the nature of specific relief." Commonwealth of Mass. v. Departmental Grant Appeals Board, 815 F.2d at 783;



see Pet. App. 5a-6a. That conclusion is not consistent with the evidence that Congress intended to authorize grant program litigation in the district court, but it is also beside the present point which is that the district court could (and did) grant complete relief by reversing the agency's decision and remanding the matter.[14/]

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14/ Maryland Department of Human Resources v. HHS, 763 F. 2d 1441, 1446 (D.C. Cir. 1985), reached the result we seek here by distinguishing an action for "money damages" from one for "specific relief." The Secretary's brief assumes the considerable burden of examining and undermining the Maryland distinction. As demonstrated above, however, this case seeks neither "money damages" nor "monetary relief," and the district court satisfactorily resolved the dispute by reversing the Board's decision. Therefore, the Court need not adopt the reasoning of Maryland to reject the Secretary's characterization that this action is a suit for "money damages."

In sum, this is not a case for "money damages" beyond the jurisdiction of the district courts.

### 3. The Tucker Act Does Not Create an "Adequate Remedy" in the Claims Court that Bars District Court Review.

The waiver of sovereign immunity contained in section 702 includes "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. The Secretary argues that a disallowance is unreviewable in the district court because the Tucker Act provides an "adequate remedy" in the Claims Court. Sec. Br. at 43-44. The Secretary assumes, for the sake of his argument, that the Commonwealth's action is not one



for "money damages." Sec. Br. at 11. But if the Commonwealth's action is not one for "money damages," it follows (as we argue in Point II, below) that an action for judicial revew of a disallowance is not within the jurisdiction of the Claims Court under the Tucker Act. If this is so, then the Secretary's argument that an action under the Tucker Act is "adequate" fails a fortiori. However, even if Congress conferred jurisdiction on the Claims Court over such "non-monetary" claims, we argue below that jurisdiction does not preclude district court jurisdiction under the APA because, by the Secretary's own admission, the remedies

in the Claims Court are not "adequate."[15/]

The relevant provision in section 704 was primarily "intended . . . to codify the existing law concerning ripeness and exhaustion of remedies," (Mass. v. Dept. Grant Appeals Board, 815 F.2d 778, 784 (1st Cir. 1987)), by ensuring that pre-enforcement review would not be available if "subsequent review in enforcement proceedings is 'adequate.'" Administrative Procedure Act: Legislative History, S. Doc. 248, 79th Cong. 2d Sess. 38 (1946). Thus the Secretary is reading a limitation in the waiver of section 702 where none exists,

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15/ Indeed, in conceding that the Commonwealth could litigate in the district court if it waived the federal share of past expenditures, the Secretary acknowledges that an award of money is not an adequate remedy in an ongoing grant program.



or was intended. At the least, he is urging on the Court an overly broad reading of the purported limitation.

Even if section 704 imposes the limitation urged by the Secretary, it would not apply in this case, because the remedy in the Claims Court is not "adequate." The Tucker Act remedy in the Claims Court is inadequate because the Claims Court has no authority to provide the injunctive and declaratory relief available in the district court and often necessary to complete relief in a disallowance case.[16/] "The

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16/ The Claims Court is an Article I court, created by the Federal Courts Improvement Act (FCIA) of 1982, Pub. L. No. 97-164, 96 Stat. 25. The jurisdiction of the Claims Court includes the trial jurisdiction of the "United States Court of Claims," which was abolished by the FCIA. The decisions of the Claims Court are appealable under 28 U.S.C. § 1295(a)(3), to the United States Court of Appeals of the Federal Circuit.

Claims Court or district court exercising Tucker Act jurisdiction ordinarily lacks the authority to grant specific performance of contracts as well as other forms of equitable relief." Spectrum Leasing Corp. v. United States, 764 F.2d at 895 n. 7 (citation omitted). Only "in limited circumstances the Claims Court when exercising Tucker Act jurisdiction may be empowered to grant such equitable relief where the relief sought is in the form of money." Id. at 895 n. 7. In fact, prior to 1972, the Claims Court's predecessor (the Court of Claims) had no power to enter any equitable relief. See, e.g., United States v. King, 395 U.S. 1 (1969); Richardson v. Morris, 409 U.S. 464 (1973)(per curiam). In 1972, the Tucker Act was amended to grant the



Court of Claims "the power to remand appropriate matters to any administrative or executive body or official with such directions as it may deem proper and just." Pub. L. No. 92-415, 86 Stat. 652 (1972) (amending 28 U.S.C. § 1491). The legislative history of this "remand provision" demonstrates that Congress intended that the remand power conferred on the Court of Claims was more limited than the equitable jurisdiction of the district courts.[17/] In fact, Congress limited the equitable power given the Court of Claims after the Department of Justice expressed its concern about

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17/ See S. 1704, 90th Cong., 2d Sess. (1968); S. Rep. 1465, 90th Cong., 2d Sess. 4 (1968); S. Rep. 92-1066, 92d Cong., 2d Sess. 2 (1972); H.R. 12392, 92d Cong., 2d Sess. (1972); H.R. Rep. 92-1023, 92d Cong., 2d Sess. 5 (1972).

giving that court authority "over a wide range of governmental activities" or authorizing persons to "claim all sorts of relief against any agency of the Government."[18/] The legislative history further shows that Congress intended the remand power to be exercised only in government contract disputes. See S. Rep. 92-1066 at 3; H.R. Rep. 92-1023 at 4.

Following the enactment of the "remand provision," this Court and the Court of Claims consistently held that the Tucker Act did not authorize permanent or preliminary injunctive relief, declaratory judgments, or writs of mandamus. E.g., Lee v. Thornton, 420

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18/ Collateral Relief in the Court of Claims: Hearing on H.R. 12392 Before Subcomm. No. 2 of the House Comm. on the Judiciary, 92d Cong., 2d Sess. 114, 121, 123, 134, 127 (1972).



U.S. 139 (1975) (per curiam); Smith v. United States, 654 F.2d 50, 53 (Ct. Cl. 1981).[19/]

The limited remedies available in the Claims Court are particularly inadequate in grant-in-aid disputes. The Secretary concedes that "the remedial powers of the Claims Court . . . will be limited to the power to render a money judgment and the limited power of remand to the agency that is given by 28 U.S.C. § 1491(a)(2)[,]" and that the "court will not have the power to issue a declaratory judgment that the GAB has misconstrued the law, or to enjoin peti-

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19/ In the Federal Courts Improvement Act of 1982 (the "FCIA"), Congress for the first time gave the Claims Court authority to enter declaratory judgments, injunctions, and other equitable relief in certain contract cases. See Pub. L. No. 97-164, § 133, 96 Stat. 25, 40 (1982) (codified at 28 U.S.C. § 1491(a)(3)).

tioners henceforth to construe the law differently when dealing with respondent." Sec. Br. at 45 (footnote omitted). Since the Claims Court cannot enter declaratory or injunctive relief (Sec. Br. at 45), the States could be required to commence suit in the Claims Court for each disputed period. The Claims Court would also be barred from issuing preliminary injunctions to prevent irreparable harm to individual beneficiaries or to States concerned about the elimination of disputed services.[20/]

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20/ The Secretary suggests that since such cases are "simply a dispute about a stream of money payments over time," the Claims Court can provide complete relief and provide a "statement of the law that will bind the federal government in future dealings with the plaintiff." Sec. Br. at 44. The Claims Court cannot however, provide "complete" relief. Furthermore, the Secretary's statement grossly minimizes the important services at stake and ignores the limited resources of beneficiaries and States to repeatedly litigate in the Claims Court.



In sum, the language and legislative history of the APA and the Tucker Act demonstrate that the remedies available in the Claims Court are not "adequate" remedies which would bar district court review of grant disallowances under the APA.

### C. The Social Security Act and the Federal Courts Improvement Act Support District Court Review of Grant Disallowances.

The jurisdiction of the district court over this case also is supported by considering the "entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." Feres v. United States, 340 U.S. 135, 139, (1950).

The Secretary does not address the overall statutory context of this case. His narrow focus fails to take into account related legislative enactments and their histories, and ignores the anomalous consequences of his position. The Social Security Act (SSA) and Federal Courts Improvement Act of 1982 (FCIA) demonstrate long-term and prevailing Congressional intent to (1) vest power to review agency action under Title XIX and other titles of the Social Security Act in the district courts and the regional courts of appeals, and (2) limit the creation and jurisdiction of "specialized" courts, particularly those created by the FCIA.

1. The Social Security Act is one of the most complex statutes Congress has ever enacted. See Schweiker v. Gray



Panthers, 453 U.S. 34, 43 (1981). Pursuant to the Act, federal agencies have promulgated extensive regulations which set forth detailed policies and requirements for the programs covered by the Act.

The Social Security Act has a breadth of social impact that is equal to the depth of its terms. The Medicaid program is the largest of several cooperative federal-state programs operated under the authority of the Social Security Act to provide medical, financial, and other assistance to needy citizens. Programs under the Act include: Medicaid (Title XIX), social services (Title XX), and aid to families with dependent children (AFDC)(Title IV). Non-grant programs created by the Act include Social Security and Medicare.

The district courts and regional courts of appeals have substantial experience deciding cases involving grant-in-aid programs under by the Social Security Act. This judicial experience has developed because Congress has often explicitly provided for judicial review of agency action under the Social Security Act in those courts. E.g., 42 U.S.C. § 405(g)(Social Security disability cases reviewable in district court); 42 U.S.C. § 1395oo(f) (district court review of certain actions brought by Medicare providers).

In the Medicaid Act itself, Congress has specifically authorized review in the court of appeals for "compliance" questions closely related (and sometimes nearly identical) to those raised in Medicaid disallowance disputes. Under 42 U.S.C. § 1396c, the Secretary may



review state plans, and amendments thereto, to determine whether they comply with the Medicaid Act. The "state plans" submitted to the Secretary under the Medicaid program contain lengthy and detailed descriptions of services provided under that program. If the Secretary rules that a plan does not comply with the Act, he may terminate federal Medicaid grants in whole or in part. Id. The Secretary's decision on a "compliance" matter is subject to judicial review in the court of appeals in which the State is located. 42 U.S.C. § 1316(a)(3); State of Ohio v. Dept. of HHS, 761 F. 2d 1187 (6th Cir. 1985).[21/] Past litigation in the

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21/ Under the Secretary's regulations, amendments to a state plan are subject to his approval, but effective on the date indicated by the state. 45 C.F.R.

(footnote continued)

courts of appeal demonstrate that a question of law or policy can often form the basis for either a disallowance or compliance dispute. E.g., Massachusetts v. Grant Appeals Board, 698 F. 2d 22 (1st. Cir. 1983). The court of appeals noted in this case that disallowances are used by the Secretary "to implement important policies governing ongoing programs." Pet. App. 4a. Given the fact that Congress expressly authorized court of appeals review for such closely related questions arising under the Medicaid Act, it is inconceivable that

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(footnote continued)

§ 210.3(g)(1987). The regulations also provide for administrative and judicial review (in the court of appeals) of a disapproval of plan amendments. Id. at §§ 203.4 and 203.7. Most importantly, the regulations further provide that upon the reversal of a prior disapproval, the Secretary will "certify restitution forthwith in a lump sum of any funds incorrectly witheld on otherwise denied." Id. at 201.4.



Congress intended that challenges to disallowances would be relegated to the Claims Court.[22/]

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22/ The result sought by the Secretary would also be anomalous because it would remove from the district courts important issues of federal-state relations presented by grant-in-aid disputes. As a general proposition, this Court has required Congress to seasonably and unambiguously express federal conditions on the States' receipt of grants under the Medicaid and other programs. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 25 (1978); see Bell v. New Jersey, 461 U.S. 773, 794 (1983)(White, J., concurring). Each time that the Secretary asserts his power to retrospectively interpret the Medicaid Act and to refuse to supply the federal share of reimbursement for past and future services, he imposes conditions which were not clear when the State's plan was approved or when it expended funds to purchase services for needy persons. The Secretary's view of jurisdiction thus imputes to Congress an intent to deprive the States of an Article III forum for the resolution of legal issues which effect millions of beneficiaries and implicate important issues of federalism.

Thus the result sought by the Secretary in this case conflicts with the terms and purposes of related portions of the Social Security Act and the Secretary's regulations. The Commonwealth's reading of the APA and the Tucker Act should be adopted by the Court because it is more consistent with the Act and avoids severe jurisdictional anomalies that Congress did not intend.

2. The jurisdiction of the district court over this case is also supported by the terms and legislative history of the Federal Courts Improvement Act of 1982 (FCIA), which created the Claims Court and defined the scope of its authority. In his brief the Secretary repeatedly asserts that Congress granted the Claims Court exclusive jurisdiction over the Commonwealth's case. It is



remarkable, then, that the Secretary nowhere discusses the legislative history of the FCIA, the act which he admits "created" the Claims Court as it currently exists. Sec. Br. at 14 n. 9.

The FCIA created the United States Claims Court and the United States Court of Appeals for the Federal Circuit. P.L. No. 97-164, 96 Stat. 25 (1982). The enactment of the FCIA followed a long and spirited debate over the reorganization of the federal courts and the creation of specialized courts.[23/]

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23/ See H.R. Rep. 97-312, 97th Cong., 1st Sess. (1981); S. Rep. 97-275, 97th Cong., 1st Sess. (1981) at 1-8; Federal Courts Improvement Act of 1981: Hearings on S. 21 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1981).

The legislative debate and the committee reports reflect long-term and prevailing Congressional reluctance to create specialized courts to hear cases which have a wide impact on social policies. See, e.g., S. Rep. 97-275 at 39-41 (additional views of Senators Leahy and Baucus). If Congress believed in 1982 that the Court of Claims already had jurisdiction to review scores of types of agency decisions, including those made in grant-in-aid programs under the Social Security Act, the debate as to specialized courts would have been pointless. But in fact, Congress carefully limited the jurisdiction of the Claims Court and Federal Court, and refused to enact bills that would have expanded the jurisdiction of those courts or created specialized courts to hear cases involving the environment,



immigration, civil rights, aviation, and other "cases involving the interaction of laws and people." S. Rep. 97-275 at 39 (additional views of Senator Leahy).

The history of a predecessor bill to the FCIA confirms that through the creation of the Federal Circuit Congress intended to create "an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity[.]" S. Rep. 96-304 at 8 (proposed Federal Courts Improvement Act of 1979).[24/] The legislative history

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24/ "Among other things, the [FCIA] grants the Federal Circuit exclusive appellate jurisdiction over a variety of cases involving the Federal Government. 28 U.S.C. § 1295(a)(2)." United States v. Hohri, No. 86-510 (June 1, 1987),

(footnote continued)

of the FCIA nowhere mentions any case similar to this which Congress intended to remove from the then-existing caseload of the district and regional courts of appeal and transfer to the Claims Court and the Federal Circuit. This legislative silence in the FCIA is telling because at the time of the enactment of the FCIA, the federal courts had already held that the district courts had the authority to review disallowance decisions in grant-in-aid cases. See cases collected in Point I, B, supra. In construing statutes,

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(footnote continued)

slip. op. at 3. The 1981 Senate Report states that the Federal Circuit would "handle all patent appeals, plus government claims case[s] and all other appellate matters that are now considered by the [Court of Customs and Patent Appeals] or the Court of Claims[.]" S. Rep. 97-275 at 6.



the Court assumes that the Congress which enacted the law in question was aware of previous judicial decisions construing then-existing statutes. See, e.g., Director, Office of Workers' Compensation v. Perin North River Associates 459 U.S. 297, 319-320 (1983). Moreover, Congressional intent as to judicial review may be "inferred from contemporaneous judicial construction . . . and the congressional acquiescence in it[.]" Block v. Community Nutrition Institute, 467 U.S. at 349, citing Ludecke v. Watkins, 335 U.S. 160 (1948). There is no indication in the legislative history of the FCIA that Congress wished to disturb the decisions which had already found district court jurisdiction over grant disputes.

To the contrary, it is reasonable to infer that Congress foresaw at least two serious effects of such a transfer of jurisdiction. First, Congress knew that programs under the Social Security Act primarily affect needy people who would most benefit from the convenience of litigating questions under the Act in their local federal courts. United States v. Hohri, supra, notes that district court jurisdiction grants the "right to bring suits in the districts where [plaintiffs] reside without subjecting them to the expense and annoyance of litigating in Washington." Id., slip op. at 1-2 n. 1. Congress was aware of the burden which would be imposed on the States and recipients of Medicaid and other benefits who would be forced to litigate in Washington. Yet



if the Secretary's position is adopted, virtually all disallowance disputes in federal grant-in-aid programs, as well as other actions arising under the SSA, will be channeled to Washington for litigation in the Claims Court and the Federal Circuit.[25/] There is no legislative evidence that Congress intended such a result.

Second, Congress was aware that the substantive issues presented by grant cases arising under the Social Security Act and similar statutes are far from routine questions of law. See Pet. App. 8a; Schweiker v. Gray Panthers, supra. In fact, by 1982, the district courts

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25/ In fact, the Secretary has already taken the position that the Claims Court has exclusive jurisdiction over a suit by recipients against a state in which the state files a third-party complaint against the Secretary. See Grimesy v. McMahon, No. 87-1228 (pending in the Federal Circuit).

and regional courts of appeals had developed substantial experience in these areas.[26/] In the absence of a clear indication in the FCIA that Congress intended to extinguish the jurisdiction of these courts, and to confer it on the two newly-created, specialized courts, the Court should reject the Secretary's latest construction of the APA and the Tucker Act.

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26/ Indeed, the resolution of the merits of this case required reference to both the Social Security Act and the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. (EHCA). At the time of enactment of the FCIA, the district courts and the courts of appeal had acquired substantial experience with EHCA. See Burlington School Committee, supra; Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982).



## II. THE TUCKER ACT DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION OF THIS CASE.

### A. The Tucker Act Does Not Confer Jurisdiction On The Claims Court Over This Case.

The Secretary argues that if any aspect of the Commonwealth's case is within the jurisdiction of the Claims Court under the Tucker Act, then the district court lacks jurisdiction over the entire action, and the court of appeals erred in concluding that such a case could be "bifurcated." Sec. Br. at 36-46. However, this argument assumes that this case may be brought under the Tucker Act. The Secretary himself acknowledges that the issue of "claim-splitting" only arises if the case "includes a Tucker

Act claim. . . ." Sec. Br. at 11. If the Commonwealth's case is not within the Tucker Act, then the Tucker Act does not preclude the Commonwealth from relying upon § 702's waiver of sovereign immunity, and invoking the federal question jurisdiction of the district courts under 28 U.S.C. § 1331. See Maryland v. Dept. of HHS, 763 F. 2d at 1448, 1450 n. 5.

The Tucker Act provides in relevant part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases sounding in tort.



28 U.S.C. § 1491. This section waives the sovereign immunity of the federal government and defines the jurisdictional limits of the Claims Court relevant to this case. The Tucker Act, does not, however, "create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398 (1976). Thus a plaintiff invoking the jurisdiction of the Claims Court under the Tucker Act must assert a substantive right that derives from another source of law. Id. A "claim" cognizable under the Tucker Act "must be one for money damages against the United States . . . and the claimant must demonstrate that the source of substantive law he relies on can fairly be interpreted as mandating compensation

by the Federal Government for the damage sustained." United States v. Mitchell, 463 U.S. 206, 216-217 (1983), citing United States v. King, 395 U.S. 1, 2-3 (1969), and United States v. Testan, 424 U.S. at 400.[27/]

The Secretary argues that the Medicaid Act "can fairly be interpreted (if respondent is right on the merits) as mandating compensation by the federal government for the 'damage' sustained (i.e., payment of the amount of reimbursement incorrectly witheld)." Sec. Br. at 17. This broad reading ignores the rule that in "determining

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27/ See Murray v. U.S., 817 F. 2d 1580, 1582-1583 (Fed. Cir. 1987); Hambsch v. United States, 12 Cl. Ct. 744, 749 (1987), citing Eastport S.S. Corp. v. United States, 372 F. 2d 1002, 1009 (Ct. Cl. 1967)(Claims Court cannot grant any relief absent a "mandate" for an "award of money damages").



the general scope of the Tucker Act, this Court has not lightly inferred the United States' consent to suit." United States v. Mitchell, 463 U.S. at 218. For the reasons set forth in Point I regarding the term "money damages" in the APA, Massachusetts does not seek "damages for the Government's past acts, the essence of a Tucker Act claim for monetary relief." United States v. Mottaz, 476 U.S. 834, 851 (1986) (citation omitted).[28/] Since the Secretary himself equates the term "money damages" in the

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28/ Cf. Maryland v. Dept. of HHS, 763 F. 2d at 1450 (action for review of Title XX disallowance not cognizable under Tucker Act because Title XX does not "mandate compensation" for damages sustained); Delaware Div. of Health v. U.S. Department of HHS, 665 F. Supp. at 1117 (action for judicial review of Medicaid disallowance not a "claim" against the United States under section 1491).

APA with Tucker Act jurisdiction, the Tucker Act does not apply to this case unless it can be characterized as a suit for "money damages" outside the APA.

Furthermore, the Secretary's argument relies upon a mischaracterization of Medicaid as a program in which the States "demand payment" under a statute that "requires the federal government to pay the grantee money. . . ." Sec. Br. at 17 n. 14. The Medicaid Act does not authorize "damage" awards. It is not even monetary in its purpose. The Act represents a Congressional statement of federal cooperation in the provision of important human services. See 42 U.S.C. § 1396; Harris v. McRae, 448 U.S. 297, 308 (1980). The Secretary has cast himself as a mere paymaster, rather than



as a partner in a joint effort to serve people in need. But the Secretary's latest incarnation cannot transform the federal share of reimbursement into "damages sustained" by a State.

### B. Even if the Tucker Act Applies to Some Portion of this Case, It Does Not Deprive The District Court of Jurisdiction.

The district court had jurisdiction over this case. The court of appeals incorrectly concluded otherwise. However, even if, as that court hypothesized, the Tucker Act deprives the district court of jurisdiction over some aspect of the case, the Tucker Act does not entirely deprive the district court of jurisdiction. See Sec. Br. at 36-46.

The Secretary admits that if only funding for future services were at

issue (i.e., if the Commonwealth "foregoes. . . recovery" as to "prejudgment events"), the district court would have authority to grant "nonmonetary" relief. Sec. Br. at 15 n. 11. Given that concession, the Secretary cannot maintain that the result reached by the court of appeals is prohibited by statute, and his argument that the Claims Court should be found to have exclusive jurisdiction simply elevates the policy against claim-splitting above the presumption of district court jurisdiction, despite strong evidence of contrary legislative intent.

The Secretary also argues that if the Commonwealth's case is cognizable under the Tucker Act, then the APA does not apply because, under section 702(2),



the Tucker Act "impliedly forbids" the relief sought. Sec. Br. at 44-46. Thus the Secretary argues that even as to the vitally important questions of Medicaid coverage, a State may obtain reversal of a disallowance only in the Claims Court, because any action which follows a disallowance and does not waive relief as to past services is, at least in part, an action for a money judgment within the exclusive jurisdiction of the Claims Court.

The Secretary's argument overlooks the legislative history of section 702(2). The history shows that, as to the Court of Claims, the section was intended only to protect the jurisdiction of that court over government contracts disputes. See H.R. Rep. No. 94-1656 at 12-13. Even if a broader reading of

the APA is supportable, the Secretary's application of section 702(2) ignores the fact that, at the time of the enactment of the APA amendments of 1976, one circuit court of appeals had already held that Medicaid disallowances were reviewable in the district courts. See County of Alameda v. Weinberger, 520 F. 2d 344 (9th Cir. 1975). Thus the Secretary would impute to Congress in 1976 the view that the Tucker Act, at that time, forbade district court jurisdiction over grant disputes which had already been determined by a court of appeals.[29/]

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29/ The Secretary's argument is also refuted by cases which have held that the district court does not lose jurisdiction over a claim for nonmonetary relief even if a judgment for such relief may form the basis for a later money judgment. See, e.g., Hahn v. United States, 757 F. 2d 581, 589 (3d Cir.

(footnote continued)



In sum, the Tucker Act does not "impliedly forbid" district court jurisdiction over this case, even if some portion of the case were cognizable under the Tucker Act. If "claim-splitting" were to result, it would be the inevitable and tolerable by-product of the interplay of the APA and the Tucker Act. Since the Secretary concedes that the district courts have jurisdiction to review disallowances in some circumstances, his concern for claim-splitting reduces to a policy concern best directed to Congress, not the Court.

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(footnote continued)

1985). See also Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 71 n. 15 (1978).

## CONCLUSION

The judgments of the court of appeals should be affirmed in part and reversed in part, and the cases should be remanded with instructions to reinstate the judgments of the district court.

Respectfully submitted,

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# APPENDIX

5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be

entered against the United States; Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.



5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) Compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.



28 U.S.C. § 1295(a)

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under section 1338(a) shall be governed by

sections 1291, 1292, and 1294 of this title;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive



department providing for internal revenue shall be governed by section 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Claims Court. . . .

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1346(a)

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not



sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. . . .

28 U.S.C. § 1491

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive

department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or



executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(a)(1) Whenever a State plan is submitted to the Secretary by a State for approval under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for approval under such subchapter. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a final determination of the Secretary



under section 304, 604, 804, 1204, 1354, 1384, or 1396c of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determinations as provided in section 2112 of Title 28.

(b) For the purposes of subsection (a) of this section, any amendment of a State plan approved under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, may, at the option of the

State, be treated as the submission of a new State plan.

(c) Action pursuant to an initial determination of the Secretary described in subsection (a) of this section shall not be stayed pending reconsideration, but in the event that the Secretary subsequently determines that his initial determination was incorrect he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied.

(d) Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, shall be disallowed for such participation, the State shall be



entitled to and upon request shall receive a reconsideration of the disallowance.

42 U.S.C. § 1396c

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this title [42 U.S.C. §§ 1396a et seq.], finds --

(1) that the plan has been so changed that it no longer complies with the provisions of section 1902 [42 U.S.C. § 1396a]; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).